future agreements, could suggest that the intention of the legislature might be that payments made under agreements already existing are not to be recoverable in any circumstances. However, I do not take the view that any implied intention of the legislature as to the effect of the legislation, is sufficient to outweigh the application of the common law principle in all circumstances. Its effect is to be limited, in my judgment, to showing the intention that there is to be no statutory right to recover and, while that is a consideration to be taken into account in applying the common law principle, it does not so far outweigh the other considerations so clearly expressed by Lord Mansfield as to lead to the conclusion that the parties in the present case must be treated as if they were *in pari delicto*.

I would therefore allow both the appeal and the cross-appeal in part and set aside the judgment of the court below except in regard to the dismissal of the claim for possession. I would substitute judgment in favour of the respondent for a balance of $190 in respect of excess rent paid and for the amount paid by way of assessment since the coming into force of the 1956 Ordinance. ,

As both parties have succeeded in part, I would order each party to pay his own costs in this court. In the court below the respondent should have his costs based on the amount for which he now has judgment.

Thomson L.P. and **Tan Ah Tah F.J.** concurred.

Appeal and cross-appeal allowed in part. Each party to pay his own costs.

Solicitors: *Peh Swee Chin; Maxwell, Kenion, Cowdy & Jones.*

LIM CHUAN CHENG v. THE BORNEO CO. LTD.

[F.C. (Wylie C.J. (Borneo), Wee Chong Jin C.J. (Singapore) & Tan Ah Tah F.J.) June 9, 1964]

[Kuching — Federal Court Civil Appeal No. 99 of 1963]

Master and servant — Oral contract of service — Repeated and wilful disobedience of superior's orders by chief cashier — Misconduct — Repudiation of contract of service — Right of summary dismissal not exercised — Dismissal by payment of one month's salary in lieu of notice — Whether condonation — Whether notice reasonable — Pay in lieu of leave not taken — Whether claimable.

Damages — Dismissal by payment of one month's salary in lieu of notice — Claim for specific sum — Whether maintainable.

The appellant entered the employment of the respondents on July 1, 1935. He was first employed as an accounts clerk, became a cashier in 1938 and in 1962 held the post of chief cashier at the salary of $550 per month in the respondents' branch office in Sibu.

On January 12, 1962 the appellant was requested by one S, the imports manager and the appellant's superior, to pay out monies to masons employed by a firm for which a payment voucher had already been made out and signed. The appellant refused to pay at which S ordered him to pay. This order was not obeyed and S told the appellant that if he did not make the payments he would be reported to the branch manager. The appellant still refused to pay and he was reported to the branch manager who, after calling in the appellant, instructed the assistant cashier to make out the payments.

On January 13, 1962, the appellant's employment was terminated by a letter signed by the branch manager which stated, *inter alia*, that at the close of business on that day, the appellant could draw his salary to date plus one month's salary in lieu of notice. The appellant did not draw the salary to date for that month nor the month's salary in lieu of notice but wrote a letter on the same day asking for reasonable compensation for loss of office. After further correspondence, the branch manager wrote a letter on February 24, 1962 offering to pay the appellant 3 months' salary in recognition of his long service to the respondents. The appellant did not accept the offer and commenced an action for damages for wrongful dismissal and 13 weeks leave-pay in lieu of leave not taken. The trial judge in dismissing the appellant's claims held that (i) the respondents were entitled to dismiss the appellant summarily because of the wilful and repeated disobedience by the appellant of a superior's reasonable and lawful order; (ii) failure by the respondents to dismiss the appellant did not amount to a condonation of the appellant's misconduct; and (iii) the respondents were entitled to terminate the appellant's services on notice, on giving salary in lieu of notice, of any notice, and that they were within their rights in terminating the appellant's services on giving one month's salary in lieu of notice. On appeal it was argued that the trial judge was in error when he found that the appellant had been guilty of misconduct which warranted summary dismissal; and that by offering the appellant one month's salary in lieu of notice the respondents had condoned the offence by the appellant.

Held: (1) there were no reasons why the court should differ from the view of the facts taken by the learned trial judge;

(2) the learned trial judge was correct on his decision that the conduct of the appellant warranted summary dismissal;

(3) by offering the appellant 13 days salary together with one month's salary in lieu of notice the respondents were not condoning the conduct of the appellant.

Cases referred to:—

(1) *Laws* v. *London Chronicle (Indicator Newspapers) Ltd.* [1959] 1 W.L.R. 692.

(2) *The Manager, Scudai Estate, Johore Bahru* v. *Narayanan* [1960] M.L.J. 162.

(3) *Jupiter General Insurance Co. Ltd.* v. *Ardeshir Bomanji Shroff* [1937] 3 All E.R. at p. 67.

(4) *Hurst* v. *The Sheffield Corporation* (1916) 85 L.J. K.B.

In the court below the following judgment was delivered:

McGilligan J.: The plaintiff's claim is, as a former employee of the defendant company, for damages for wrongful dismissal, and for 13 weeks leave-pay in lieu of leave not taken.

In his statement of claim he puts the damages to which he avers he is entitled at $6,600, the equivalent of 12 months wages at $550 per month. It is unusual for a fixed sum to be claimed for wrongful dismissal, as damages for it are regarded as unliquidated, but it does not in any way invalidate the claim, though it may limit the amount awardable (if damages are found due) to the figure claimed.

The plaintiff asks for 13 weeks leave-pay at double rates in his statement of claim, but no grounds of any sort for asking double rates have been put forward, and counsel for the plaintiff has discarded that much of the claim. The claim is now, therefore, for 13 weeks' leave-pay at the ordinary (that is, single) rate.

The defence, as I understand it, is two fold: First, that the plaintiff was not wrongfully, but rightly and lawfully, dismissed — for insubordination, as it is termed in the written defence. Secondly, that he was in any case at any time liable to have his services terminated, at the will of the defendant company, for any or for no reason, by one month's notice of termination, and that he was here given (though he refused to accept it) one month's salary in lieu of notice.

Many of the facts are common ground between the parties. The facts which I am now going to set out are either common ground, or have not been disputed, or are held by the court to have been proved.

The plaintiff entered the employment of the defendants, the Borneo Co. Ltd., on the 1st of July 1935. He was first employed as an accounts clerk, became a cashier about 1938, and in 1962 held, and had for many years held, the post of chief cashier in the defendants' branch office in Sibu. On the 13th of January 1962 his employment by the defendants was terminated by a letter signed by the branch manager, Sibu. It reads as follows:—

"1. We refer to our correspondence last evening and again this morning and after due consideration it has been decided that your services with the company should be terminated.

2. We regret the necessity for taking this action after your long unbroken service with the company but the reason for doing so is best known to yourself.

3. At the close of business to-day you may draw your salary to-date plus one month's salary in lieu of notice.

4. We are writing to the controllers of the company's provident fund asking them to close your account and as soon as this has been done you will be paid your due entitlement in this respect.

5. The normal Service certificate can be made available to you if you require one."

There has never been any written contract between the plaintiff and the defendants. One would have expected that there would have been originally some sort of letter of appointment, but the plaintiff says there was not, and in the absence of any evidence to the contrary the court accepts this statement as true.

Throughout his employment by the defendants the plaintiff received his salary monthly. At the date of termination of his employment his monthly salary, including allowances and before deductions, was $550.

The plaintiff was entitled to two weeks leave on full pay per year of employment. At the date of termination of his employment he had actually taken during the preceding (presumably 11) years only 9 weeks leave, whereas he could have taken 22 weeks leave. This was not disputed by the defendants.

The plaintiff became a member of the company's provident fund in October 1940. Contributions are made to this fund by both employee and employer. On the 12th of April 1962 he received from the fund the sum of $19,730.36. There is no doubt that this was the full amount to which he was entitled, and the plaintiff has made, and makes, no claim in respect of the provident fund.

By the letter of 13th January 1962 the plaintiff was informed (though not in the clearest of ways) that his services were terminated, and he was told that at the close of business that day he could draw his salary to date for that month — 13 days salary — and one month's salary in lieu of notice. He did not, however, draw either the 13 days' salary or the month's salary in lieu of notice. Instead he replied with a letter of the same date, the 13th of January 1962, asking for reasonable compensation for loss of office. After further correspondence (which was put before the court in the agreed bundle of letters, Exhibit A) the Sibu branch manager wrote a letter on the 24th of February 1962, which reads as folows:—

"I refer to our letter CY 14/395 and would advise that our Kuching Management have given your case further consideration, and now wish to pay you 3 months salary in recognition of your long service with the Company.

2. Would you therefore, call at this office and collect the 13 days salary to which you are entitled plus the 3 months salary mentioned above."

The plaintiff was not, however, prepared to accept this offer of 3 months' salary, and after still further correspondence (also before the court in Exhibit A), in which no agreement was reached, the plaintiff commenced this action in March 1963. He has never drawn out the 13 days' salary due to him, or a further one month's salary in lieu of notice, or a further 3 months' salary. Since the date of termination of his employment on the 13th of January 1962, he has actually received from the defendants no money, by cash or by cheque, except the $19,730.36 from the provident fund.

Having related so much of the story there are three points which can at once be dealt with as a preliminary to coming to the real issues involved.

First, there is the fact that neither was the plaintiff given one month's notice, nor was one month's salary in lieu of notice actually, physically, given to or received by him. However, there is no doubt or dispute that he was offered one month's salary in lieu of a month's notice, or that he could have at once drawn out a sum equivalent to one month's salary on receiving the letter of 13th January 1962. It may be, and is, presumed that he could still draw out one month's salary (indeed 3 months' salary) if he wished to. Further, it has never been suggested by the plaintiff that the defendants were not entitled to give salary in lieu of notice, nor is the claim in any way for failure to provide work; the nature of the duties of the plaintiff were such that it could not be said, in my opinion, that the defendants were under a duty to provide work. The court is accordingly going to proceed on the basis that the defendants were entitled to give salary in lieu of notice (this is not a decision on the length of notice required) and that the offer and availability of one month's salary in lieu of notice has the same effect in law as if one month's salary had actually been put into the plaintiff's hands.

Second is another point not apparently considered by either party: the authority of the branch manager, Sibu, to terminate the plaintiff's employment. This authority, provided the terminating was done in due manner, has never been questioned by the plaintiff, and has on the part of the defendants been taken for granted throughout. The court therefore presumes and accepts that the branch manager Sibu did in January 1962 have the power and authority, as agent of the defendant company and in his position as manager, to terminate in accordance with law the employment of the plaintiff.

Third is one of the defences put forward for the defendants, but put forward, I think it will be agreed, not very whole-heartedly. The plaintiff, on receiving $19,730.36 from the provident fund, signed a receipt, which says:—

> "Received from the Borneo Co., Ltd. $19,730.36 (Dollars nineteen thousand seven hundred and thirty and cts. thirty six only) being in full and final settlement of all amounts due to me by the company.
>
> I hereby agree and confirm that I have no further claim against the company of any kind whatsoever, either already due or contingent."

It was argued, and it was put to the plaintiff in cross-examination, that these words meant that on the signing of the receipt he relinquished all claims against the defendants arising out of his employment and the termination of it. The court does not accept this argument. Clearly, in the circumstances, this was only an acknowledgment that he had received all that was due to him from the provident fund; nothing else and nothing more. Little weight can be given to the words written by the plaintiff "A/c P. Fund only" on the carbon copy of the receipt (which words were certainly written at a time different from, and later than, the time the receipt was signed); but the receipt read as a whole and read with the relevant payment voucher (Exhibit K), which states that the $19,730.36 was "in full and final settlement of P. Fund", can lead the reader only to one conclusion, the conclusion just stated, that the receipt shows only that the plaintiff had received all that was due to him from the Provident Fund. In addition, there is the fact that at the time, the 12th of April 1962, the plaintiff had not drawn out the 3 month's salary offered him, though by his letter of 28th February 1962 he had indicated that he was going to do so; clearly he cannot have had the intention of abandoning all claim to salary in lieu of notice, not, at the least, to the 3 months salary already offered. Further, on the 12th of April itself he wrote a letter to the branch manager, one paragraph of which shows that he did not then regard the whole matter as settled; it reads —

> "5. As a conclusion, I quote from my letter to Kuching 'I would like to communicate a word to you before proceeding to London or alternative whichever advisable till the case is satisfactorily settled.' With this understanding I would receive the provident fund and leave the rest all alone until then."

That line of defence must, and does, fail.

I now come to the "insubordination" by the plaintiff which is alleged in paragraph 3 of the written defence, and elaborated on in the letter of 9th May 1963 (Exhibit A8 is a copy) from the advocates for the defendants to the plaintiff. This insubordination is alleged to have occurred in the course of an incident on the 12th January 1962 involving the plaintiff and a Mr. Spencer, at that time imports manager in the Sibu branch of the Borneo Co. Ltd. There is no doubt that there was on that day in the defendants' premises in Sibu an incident in which the plaintiff and Mr. Spencer were involved. The question is: what exactly happened; what were the details of the incident?

The court has heard the evidence of the plaintiff, of Mr. Spencer, of one Dee bin Mohamed, office boy, and of Mr. Siaw Yaw Sian, now chief cashier, but on the 12th of January 1962 assistance cashier, in the defendants' Sibu branch. Having carefully considered all this evidence, and the demeanour of these witnesses in the box, and having duly weighed the probabilities, the court is satisfied and holds that the story put forward by the defence is basically the true one.

The evidence of Dee bin Mohamed can be discounted. He has one of those memories (useless or useful, depending on one's viewpoint) which cannot recall anything likely to put its owner in the position of having to take one side or the other; as far as he was concerned nothing really happened at all. The plaintiff and Mr. Spencer were protagonists in this incident, and the court sought means other than a comparison of the two of them to arrive at its decision. Such means were not hard to find — in Mr. Siaw Yaw Sian. He had a much better memory than Dee bin Mohamed. He was undoubtedly in what was called the "accounts department", and with the plaintiff, throughout the incident. He struck the court as a completely guileless and unbiased witness, and it accepts that he was throughout his evidence (which largely corroborates that of Mr. Spencer) telling the truth. There is also this, that it is undisputed that something occurred between the plaintiff and Mr. Spencer which resulted in the latter's reporting the matter to the branch manager, Sibu, and in the plaintiff's being at once summoned, after the report had been made, to see the branch manager. The plaintiff's explanation for this is that Mr. Spencer completely misunderstood him and the situation, and that his, the plaintiff's, conduct gave no cause for his being reported. This is not a very convincing explanation, and it seems far more probable that the plaintiff did in fact do something which, as Mr. Spencer said, forced him (Mr. Spencer) to report the plaintiff to the branch manager.

The court holds that the version of this incident given by Mr. Siaw Yaw Sian and Mr. Spencer is the true and correct one. In particular the court finds that Mr. Spencer first requested the plaintiff to pay out monies to masons employed by the Union Tiling Co., for which a payment voucher (Exhibit M) had already been made out and signed; that the plaintiff refused to pay; that after first requesting the plaintiff to pay Mr. Spencer ordered the plaintiff to pay; that this order was not obeyed; that Mr. Spencer told the plaintiff that if he did not make the payment he would be reported to the branch manager; that still the plaintiff did not make the payment; that he was reported at once by Mr. Spencer to the branch manager, and then was called in to see the branch manager; that when he came out he then told the assistant cashier to make the payments to the masons, and these payments were then made by the assistant cashier, no payment to the masons having been made before.

The court also holds that the incident took place in the presence of some at least of the masons concerned and of a Mr. Rajaram, another employee of the Borneo Co., as well as Mr. Siaw Yaw Sian, and that in the course of it the plaintiff lost his temper, shouted at Mr. Spencer, and banged his hands on a table. There was therefore a public disobedience of an order and public misconduct on the part of the plaintiff.

The court has said that the plaintiff disobeyed an order, but the question remains whether Mr. Spencer had authority to give that order. The court must express its surprise that there was not clearer and more definite and detailed evidence on this point, which is one of great importance. However, there was sufficient before the court for it to be satisfied that Mr. Spencer was the plaintiff's superior in the Sibu branch, and was entitled to give him orders, which, if reasonable, the plaintiff was bound to obey. On Mr. Spencer's own uncontradicted and unquestioned evidence he was the number two in the Sibu branch of the Borneo Co. Ltd. at that time; he was imports manager, and the accounts branch, in which the plaintiff worked, was then part of the imports department. Further the plaintiff has not, before or during the case, disputed Mr. Spencer's seniority or his right to give orders to the plaintiff; his case is that he never refused to do what he was told to do.

In my judgment, because of the wilful and repeated disobedience by the plaintiff of a superior's reasonable and lawful order the defendants were entitled to dismiss him summarily — that is, at once, without notice or salary in lieu of notice. In addition, I consider that his misconduct, in losing his temper and shouting at his superior was such misconduct as to justify summary dismissal, though dismissal might have been a somewhat harsh measure for only one such act of misconduct.

The law applicable to the question of dismissal for disobedience (and, incidentally, for misconduct) is clearly set out in the case of *Laws* v. *London Chronicle (Indicator Newspapers) Ltd.*,[1] in the following quotations from the judgment of the Master of the Rolls

> "The law to be applied is stated (for example) in the paragraphs of *Halsbury's* Laws of England, 3rd ed., Vol. 25, at pp. 485 and 486, to which Mr. Stable referred us in reply; and I will cite a sentence or two as a foundation to what follows. 'Wilful disobedience to the lawful and reasonable order of the master justifies summary dismissal.' Then, a little later, 'Misconduct, inconsistent with the due and faithful discharge by the servant of the duties for which he was engaged, is good cause for his dismissal, but there is no fixed rule of law defining the degree of misconduct which will justify dismissal.... To my mind, the proper conclusion to be drawn from the passages I have cited and the cases to which we have been referred is that, since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that the question must be — if summary dismissal is claimed to be justifiable — whether the conduct

complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. It is, no doubt, therefore, generally true that wilful disobediences of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard — a complete disregard — of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master, and that unless he does so the relationship is, so to speak, struck at fundamentally.

. . . . . .

....In the present case, the judge, in the course of his judgment, said: 'It is clear and sound law that to justify dismissal for one act of disobedience or misconduct it has to be of a grave and serious nature'; and later he concluded in the plaintiff's favour, that what she had done, or not done, on June 20 was not sufficiently grave to justify dismissal.'

....With all respect to the judge, I think that his proposition is not justified in the form in which he stated it. I think it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and serious character. I do, however, think (following the passages which I have already cited) that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and for that reason, therefore, I think that you find in the passages I have read that the disobedience must at least have the quality that it is 'wilful': it does (in other words) connote a deliberate flouting of the essential contractual conditions.".

Here, in the instant case, there was clearly wilful and determined disobedience, there was a wilful repudiation of the essential contractual condition that the servant shall admit the authority of the master and obey his reasonable orders. The defendants were therefore on the 12th of January, 1962, after the incident had taken place, legally entitled to dismiss the defendant summarily, that is to terminate his employment immediately, without notice or salary in lieu of notice.

The defendants did not however summarily dismiss the plaintiff. They did immediately terminate his employment by, the letter of 13th January, 1962, signed by the branch manager, Sibu, but they gave, or made available to him, one month's salary in lieu of one month's notice. It has therefore to be decided what effect this act of the defendants had, and what consequences in law. Had they summarily dismissed him, on my findings that would have been the end of the case; but, as they did not, it is necessary to go further into the matter.

It has now, therefore to be decided what length of notice of termination the plaintiff was entitled to be given; at least it is necessary now to decide whether one month's notice was sufficient.

I do not at all accept the plaintiff's contention that he was employed for life until retirement age, on the defendants' "establishment", as it were. He really produced nothing to support this contention; his already long service and high standing amongst the Asian employees in the Sibu Branch prove nothing as to his terms of service; nor does his membership of the provident fund, to which any employee can belong, provided (according to the plaintiff's copy of the Provident Fund Rules — Exhibit J) he is receiving a salary equivalent to £750. 0. 0. per annum or more. I accept Mr. Spencer's evidence that Asian employees are employed either on a written contract, on a month to month basis, or as daily paid workers. The plaintiff was not on a written contract, and I hold that he was a monthly employee, paid by the month, and on a month to month basis.

This does not, however, mean that he was necessarily entitled to one month's notice only. There is a prevalent idea that as a matter of law a monthly servant is entitled to only one month's notice, but this idea is a misconception. The notice which must be given may be fixed either by agreement between the master and the servant or by custom, that is the usage of a trade or employment. If it is not fixed in one or other of these ways, every servant, employee, is entitled to reasonable notice.

In this case the defendants have failed to prove that the plaintiff was entitled to only one month's notice. They have not shown that it was a stated or implied term of his employment that it could be terminated on one month's notice. Mr. Spencer gave evidence that it was the custom in the Borneo Co. Ltd. to give one month's notice to monthly employees whose services were being dispensed with. I accept that as so; but, first, it does not follow that it was in each case such notice as the employee concerned was entitled to, and, secondly, it cannot be inferred that the plaintiff knew of this custom, or that if he knew of it that he accepted that because of it it was a term of his employment that he was entitled to only one month's notice of termination. It may be that there is evidence available to the defendants to show clearly that it is a part of the terms of service of all monthly employees that they are entitled to only one month's notice; but no such evidence was before the court.

As have been said, Mr. Spencer referred to the custom of the defendant company as to the giving of notice. He meant that such was the custom or practice of the defendant company. Custom, or usage, by which in a certain trade or type of employment the notice to be given may be fixed, is quite a different matter. "Custom" in this sense may be defined as a usage which by continuance has achieved the force of law or right. At the least the defendants, to establish a custom that monthly employees require only one month's notice to terminate their employment, would have to prove a custom to that effect in all businesses similar to that of the defendants in Sibu, if not

in Sarawak. This they, of course, have neither done nor tried to do.

As it has not been established that the plaintiff's employment was terminable on one month's notice, he was entitled in law (as the cases cited by counsel clearly show) to reasonable notice, that is notice of a reasonable length of time.

I am not at this stage going to state finally and precisely what was reasonable notice in the plaintiff's case; but it is, in my judgment, clear that he was entitled to more than one month's notice. He had been working for the defendants for over 25 years, held a post of responsibility, and was paid what was, in its context, quite a high salary. He was entitled, as I say, to more than one month's notice, to 3 or 6 months perhaps, (a final decision on the proper length cannot be made before going more deeply into the matter) but it can be said, and the court holds, that one month's notice of termination was not a reasonable notice in the circumstances of the plaintiff's employment.

It follows, therefore, that the defendants terminated the plaintiff's employment without giving him sufficient notice, or salary in lieu thereof. It remains to consider the effect of this finding in all the circumstances of this case.

It may be argued that the defendants, in not summarily dismissing the plaintiff, but instead terminating his employment by a letter giving one month's salary in lieu of notice, condoned the disobedience and waived their right to dismissal, and must stand or fall on the basis that the plaintiff's employment was terminated for innocent or neutral reasons. The law as to condonation of misconduct is clearly stated in the case of *The Manager, Scudai Estate, Johore Bahru* v. *Narayanan* [2] in this way:—

"....a master, with the full knowledge of his servant's misconduct, electing to continue him in the service, cannot subsequently dismiss him for the offence which he had by his subsequent warnings and conduct condoned."

Diamond on Master and Servant puts it thus:—

"If, however, the master, with knowledge of facts entitling him to dismiss the servant without notice, elects to continue him in the service, he will be held to have waived his right to dismissal."

Both these quotations refer to dismissal for misconduct, and I can find no cases or comment concerning condonation of disobedience. But I can see no reason why an act or acts of disobedience could not be condoned, just as misconduct can be. There is, however, a greater difference; in both the excerpts quoted one of the facts related is that the master elected to continue the servant in his employment. That is not the case here.

In this case it cannot be doubted, and I hold, that the letter of the 13th of January 1962 was written because of what happened between the plaintiff and Mr. Spencer on the 12th of January 1962. There are hints in the evidence that this incident was the culmination of a line of behaviour, but there is nothing concrete before the court of anything previous against the plaintiff, and it is on the incident alone of the 12th of January 1962, and by itself, that this case must be judged. On the disobedience and misconduct of the plaintiff on that day the defendants did not immediately summarily dismiss the plaintiff, but they also did not elect to continue his employment, and they did immediately (the very next day — the incident having taken place late in the working day of the 12th) terminate his employment with one month's salary instead of notice. (Had they waited a week or longer before sending the letter of termination the question of whether or not they had condoned and waived would have been a more complex one). Here I consider defendants' position must be looked upon in the same light as if they had in fact summarily dismissed the plaintiff. It cannot in any case be worse. The case of *Jupiter General Insurance Co. Ltd.* v. *Ardeshir Bomanji Shroff* [3] is to the point. The head-note reads as follows:

"The manager of the life insurance department of an insurance company recommended the issue of an endowment policy upon a life which the managing governor had a few days earlier refused to re-insure. He was thereupon dismissed, being given his current month's salary and a month's salary in lieu of notice:—

(i) upon the facts the manager was entitled to more than one month's notice, and the dismissal must be treated as a summary dismissal.

(ii) the one act of misconduct of the manager justified a summary dismissal.

Per Cur. The immediate dismissal of an employee is a strong measure, and it can be only in exceptional circumstances that an employer is acting properly in summarily dismissing an employee on his committing a single act of negligence."

Lord Maugham in his judgment says:

"Various questions were argued in the Courts below, but the only question with which their Lordships find it necessary to deal is whether, assuming that, upon the true construction of the contract of service between the parties, the respondent's employment was not terminable on one month's notice, the appellant company was entitled summarily to dismiss the respondent from its service. In the view their Lordships take of the appeal, it is unnecessary to express an opinion upon the true construction of the contract of service, or on the question as to the proper measure of damages, if any were recoverable....The respondent was in fact dismissed from his employment on December 21, 1931, by a letter stating that his services were no longer required, and that the cashier had been instructed to pay him his salary for the current month, and also one month's salary in lieu of notice....Their Lordships were not persuaded that one month's notice was sufficient unless the clause at the end of the letter of Jan. 24, 1930, could be relied on, a question which depends on facts on which there have been findings in favour of the respondent.

Their Lordships, therefore, must approach the matter as if the case was one of summary dismissal without notice, though clearly the position of the appellant company is not worse than it would have been if no salary in lieu of notice had been paid...."

Following the case just cited, the court rules that the defendants, being entitled to dismiss the plaintiff summarily, were within their rights in terminating his services on giving one month's salary in lieu of notice, even though one month's notice was not a sufficient notice. It is clearly the argument of commonsense and logic that if a master, at a given point of time, is in the circumstances entitled to dismiss his servant summarily, he is a *fortiori* entitled to terminate his services on notice, on giving salary in lieu of notice, of any notice.

The plaintiff's claim for damages for wrongful dismissal fails.

The other part of his claim is for leave-pay for 13 weeks of annual leave to which he was entitled, but did not take. There was no evidence to show, and the plaintiff did not really contend, that the plaintiff (or any other employee of the Borneo Co. Ltd. on similar terms of service) has a right at the end of each year of service in which he does not take leave to leave pay instead of leave, and the court rules (supported on its ruling by the decision in the case of *Hurst* v. *The Sheffield Corporation* [4]) that he had no such right. This ruling is also supported by paragraph 4(e) of the company's standing instructions to which the court will shortly refer. His argument is that, because on the date when his services were terminated he was due 13 weeks leave, he should get 13 weeks pay instead. This argument would be a good one only, in my judgment, if according to his terms of service the plaintiff had been entitled to accumulate leave. The defendant company have issued certain standing instructions in writing in respect of their Asian staff on the subject, *inter alia*, of annual holidays. The standing instructions in force in January 1957 were produced as Exhibit N. About annual holidays and their accumulation it is said:—

"4. *Annual Holidays.* Two weeks' leave per year on full salary to all clerical staff. Where an individual wishes to take his holiday out of the country he may accumulate it up to one month, provided he applies in advance and receives permission from his Branch Manager. Longer than one month will only be permitted in special cases, which should be referred to Kuching. The following rules will apply:

. . . . . .

(c) Holidays are intended to benefit the health of the individual, and are not extra remuneration in another form. It is therefore contrary to the whole principle of holidays to allow cash in lieu of leave.

(d) When leave is accumulated for the purpose of going overseas, or elsewhere in Borneo, then the holiday must be taken overseas as planned."

It is clear from this quotation that there was at the relevant time no rights to accumulate; leave could only be accumulated for one particular reason and on application being made and permission being given. Accumulation of more than one month required the approval of the head office and would be granted only in special cases. The plaintiff by failing to take his leave simply lost it and his right to it. At the time of the termination of his employment the current year of his service (which must be taken to have begun in July 1961, as he entered the defendant's employment in July) was only half way through, and he was therefore not yet entitled in January 1962 to any leave for the current year of his service. This part of his claim also fails.

The plaintiff's claim is dismissed with costs; the costs are to be taxed.

From the above judgment the plaintiff appealed.

FEDERAL COURT.

The appellant in person.

S. K. Reddi for the respondents.

Tan Ah Tah F.J. (delivering oral judgment): In this case the plaintiff appeals against a judgment of Mr. Justice McGilligan whereby the plaintiff's claim for damages for wrongful dismissal and other claims were dismissed with costs.

The first ground of appeal relates to the facts of the case. The appellant urges this court to hold that the learned judge was in error when he found that the plaintiff had been guilty of misconduct. With regard to the facts the learned judge made the following findings. He found that Mr. Spencer first requested the plaintiff to pay out monies to masons employed by the Universal Tiling Company for which a payment voucher had already been made out and signed; that the plaintiff refused to pay; that after first requesting the plaintiff to pay Mr. Spencer ordered the plaintiff to pay; that this order was not obeyed; that Mr. Spencer told the plaintiff that if he did not make the payment he would be reported to the branch manager; that still the plaintiff did not make the payment; that he was reported at once by Mr. Spencer to the branch manager, and then was called in to see the branch manager; that when he came out he then told the assistant cashier to make the payments to the masons, and these payments were then made by the assistant cashier, no payment to the masons having been made before.

The learned trial judge also found that the incident took place in the presence of some of the masons concerned and of a Mr. Rajaram, another employee of the Borneo Co., as well as Mr. Siaw Yaw Sian, and that in the course of it the plaintiff lost his temper, shouted at Mr.

Spencer, and banged his hands on a table. There was therefore a public disobedience of an order and public misconduct on the part of the plaintiff.

These are questions of fact on which there are findings by the learned trial judge who heard the witnesses being examined and cross-examined and had every opportunity of judging the credibility of the witnesses. I see no reason why this court should differ from the view of the facts taken by the learned trial judge.

As to whether the conduct of the plaintiff warranted summary dismissal the description given by the learned trial judge of the incident leads me to the conclusion that the learned trial judge was correct in his decision that that conduct warranted summary dismissal.

On the question whether Mr. Spencer was a superior of the plaintiff in the sense that orders could be lawfully given to him by Mr. Spencer the learned trial judge has expressed his view on that matter and I see no reason to differ from his conclusion.

The next point taken by the appellant is that by not asking the plaintiff to go immediately and by offering him one month's salary in lieu of notice the defendant company have condoned the offence. On this submission the case of the *Jupiter General Insurance Co., Ltd.* v. *Ardeshir Bomanji Shroff* [3] is very much in point. In that case the manager of the life insurance department of an insurance company recommended the issue of an endowment policy upon a life which the managing governor had a few days earlier refused to re-insure. He was thereupon dismissed, being given his current month's salary and a month's salary in lieu of notice. Now in the present case what the defendant company did was not to tell the plaintiff to go immediately but to offer him 13 days' salary being the amount due to him up to the date of the incident together with one month's salary in lieu of notice. Later on, as a result of further correspondence, Mr. Henderson, the branch manager of the defendant company, wrote to him in the following terms:—

"Dear Sir,

I refer to our letter CY14/395 and would advise that our Kuching management have given your case further consideration, and now wish to pay you 3 months' salary in recognition of your long service with the company.

Would you therefore, call at this office and collect the 13 days salary to which you are entitled plus the 3 months' salary mentioned above."

It is clear from the correspondence that what the defendant company was doing was not to condone what the plaintiff had done. They were being kind to him as they were not obliged to offer or give him the three months' salary and it is to be noted that the 3 month's salary was being offered not in lieu of notice but in recognition of the plaintiff's long service with the company.

The following passage from the judgment in *Jupiter General Insurance Co., Ltd.* v. *Ardeshir Bomanji Shroff, supra,* at page 69 is relevant:—

"Their Lordships, therefore, must approach the matter as if the case was one of summary dismissal without notice, though clearly the position of the appellant company is not worse than it would have been if no salary in lieu of notice had been paid."

It follows therefore that by offering the plaintiff 13 days' salary together with one month's salary in lieu of notice the defendant company were not condoning the conduct of the plaintiff.

There is no appeal against the other part of the judgment which holds that the plaintiff was not entitled to 13 weeks' leave pay. The appeal is only against that part of the judgment which dismissed the plaintiff's claim for damages for wrongful dismissal. As I have said his conduct was such that the defendant company had every right to dismiss him summarily. The defendant company did not condone the conduct of the plaintiff.

For these reasons I am of the view that the appeal should be dismissed.

Wylie C.J. (Borneo): I agree that this appeal should be dismissed. Yesterday the appellant made submissions which really amounted to an application for this court to review all the evidence. He set forth reasons why it should have been held on the facts that he was not properly dismissed; that his employers were not entitled to dismiss him. Those are purely questions of fact. The trial judge has given a very clear and reasoned judgment as to why he accepted the evidence of the witnesses whose evidence he did accept.

This is a Court of Appeal and I can see nothing in the record which would warrant this court, acting on the accepted principles in respect of a trial judge's findings on questions of fact, in interfering with those findings.

On the ground of appeal that dealt with the question of condonation I find it difficult to see any condonation when an employee is found guilty of misconduct and for that reason alone the employer is going to terminate his employment. Condonation involves evidence of the intention of the party concerned to determine whether or not he is condoning the behaviour. In this case the circumstances are that the employer has clearly dismissed the employee because of his behaviour. I do not feel the question of condonation seriously arises and I agree the appeal should be dismissed.

Wee Chong Jin C.J. (Singapore): I agree that this appeal should be dismissed.

Wylie C.J. (Borneo): The appeal is dismissed with costs and the deposit paid into court will be ordered to be paid out to the respondents' solicitors against taxed costs.

Appeal dismissed.

THOMAS v. BOOTY, EDWARDS & PARTNERS

[F.C. (Wylie C.J. (Borneo), Wee Chong Jin C.J. (Singapore) and Tan Ah Tah F.J.) June 10, 1964]

[Kuching — Federal Court Civil Appeal No. 19 of 1964]

Practice and Procedure — Defence — Failure to file, within time prescribed — Delay of over a month — Application for extention of time, to file defence — Application by way of motion for judgment — Application for extention of time and motion heard together — No objection raised — Motion dismissed — Defendant granted time for filing defence — Whether proper — R.S.C. O. 27 rr. 4 and 11.

The appellant commenced proceedings against the respondents for pecuniary damages. The respondents did not file a defence within the time prescribed and over a month after the time had expired, they on January 8, made an application by way of summons in chambers for an order that they be at liberty to file a defence within two weeks of the order granting them such leave. On January 9, the appellant made an application by way of motion under O. 27 r. 11 for judgment. His affidavit in support disclosed that there had been negotiations between the parties which had broken down about December 10, i.e. a few days after the defence should have been filed. The motion for judgment was dismissed and the respondents were granted time for filing the defence. The appellant now sought to vary those orders. The respondents submitted as far as the motion for judgment was concerned that these proceedings did not come under O. 27 r. 11, but under O. 27 r. 4 because the claim was for pecuniary damages. The appellant argued that as the court below had ordered him to quantify the damages, these proceedings no longer came under that rule.

Held: (1) the mere specification in the writ of the amount which the appellant considered he was entitled to under each head in a claim for pecuniary damages was not sufficient to take the case out of O. 27 r. 4; it was still a claim for pecuniary damages and therefore the motion was properly dismissed by the court below;

(2) although the delay to file the defence could not be condoned, taking the other factors into consideration it could not be regarded as such a strong feature as to deprive the respondents of their opportunity to be heard.

FEDERAL COURT.

Appellant in person.

Nayar for the respondents.

Wylie C.J. (Borneo) (delivering oral judgment): This appeal is concerned entirely with a question of procedure. The defendants did not file a defence within the time prescribed and on the 8th day of January over a month after the time had expired the defendants took out a summons-in-chambers applying for an order that they be at liberty to file a defence within two weeks of the order. That was supported by an affidavit. The reasons given were in effect that the advocate on the record was obliged to consult, and apparently got instructions from, a firm of advocates in Singapore.

On the 9th January the plaintiff moved for judgment and it is accepted that the application for motion was made under Order 27 rule 11. That was supported by an affidavit by the plaintiff which disclosed that there had been negotiations between the parties but that those negotiations broke down about the 10th of December a few days after the defence should have been filed.

The motion for judgment was dismissed and the defendants were granted time for filing the defence. The appeal has been brought to vary these orders. They are separate orders.

The first point raised concerns the hearing of the motion and summons together in chambers. It was conceded on behalf of the appellant that no objection was made to that procedure. Counsel said he was under a misapprehension at first, but during the hearing, he became aware both applications, both the motion and the summons, were being dealt with and he raised no objection. These are two applications in the same civil suit. If parties in these circumstances allow the proceedings to go on without any objection, then it is too late to raise that point of procedure in this court. I do not say at this stage, I am not expressing any opinion, whether it was in fact wrong to hear both applications together.

This disposes of the point raised in the first and second grounds of appeal.

So far as the motion for judgment is concerned it has been submitted on behalf of the respondents that these proceedings do not come under Order 27 rule 11 and that the correct rule is Order 27 rule 4 because the plaintiff's claim was for pecuniary damages.

The appellant submits that, as the court below had ordered him to quantify the damages, these proceedings no longer came under that rule. I cannot accept that submission. The claim in the writ is for pecuniary damages. All that has happened is that the plaintiff has specified the amount that he considers he is entitled to under each head. That is not sufficient to take the case out of rule 4. It is still a claim for pecuniary damages. In my judgment this motion was properly dismissed.

In regard to the summons for extension of time in which to file the defence, I have already said that there had been negotiations between the parties. This is not a case where the defendant had merely done nothing. I must say the defendant has been, in my opinion, ill-advised to have delayed for about a month. Again in my experience it is in circumstances like these that advocates usually exchange letters arguing that